IRIS CORPORATION BHD v. TAN SRI RAZALI ISMAIL & ORS

COURT OF APPEAL, PUTRAJAYA
RAVINTHRAN PARAMAGURU JCA
CHOO KAH SING JCA
AHMAD FAIRUZ ZAINOL ABIDIN JCA
[CIVIL APPEAL NO: W-02(NCC)(W)-1736-09-2022]
8 SEPTEMBER 2025

Abstract – *Directors who act honestly, with reasonable care and in good faith, are entitled to protection from liability even when their business decisions are ultimately proven unsuccessful. A director is not liable for a commercial decision that results in a loss to the company if that decision is protected by the business judgment rule under s. 214 of the Companies Act 2016. Courts must resist the temptation to apply hindsight analysis and must instead focus on the reasonableness of decision-making process based on circumstances existing at the time.*

COMPANY LAW: *Director – Director's duties – Allegations of breach of fiduciary duties, duty of care and skill and statutory duties – Approval of investment in foreign company – Investment resulted in failure – Business judgment rule – Whether protection afforded to directors – Application of combined subjective and objective tests established in Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors – Companies Act 2016, s. 214*

EVIDENCE: *Expert evidence – Forensic investigation – Weight given to conflicting reports – Allegations of breach of fiduciary duties, duty of care and skill and statutory duties – Approval of investment in foreign company – Investment resulted in failure – Business judgment rule – Whether trial court correctly preferred review report*

The appellant was the inventor of the world's first electronic passport and multi-application electronic identification system. The respondents were the directors of the appellant, serving in various capacities. In 2016, Border Control Solutions Limited ('BCS'), a United Kingdom company, made an offer to the appellant to subscribe for 10% of BCS' shares for £2 million. The appellant's Board of Directors ('Board') approved this investment through a Directors' Circular Resolution ('DCR'). Between January and August 2016, the appellant made payments, totalling £2.05 million in relation to the BCS investment, to BCS directly and its sole shareholder personally. By October 2016, concerns had emerged about the viability of the investment. The appellant's Board resolved to withdraw from the BCS investment, with the second respondent undertaking to procure a refund. No refund was, however, obtained. BCS was subsequently wound up. The appellant's Board

commissioned (i) Ferrier Hodgson MH Sdn Bhd ('FH') to conduct a review of various projects undertaken by the appellant, including the BCS investment. In its report, FH stated that there were no irregularities in the BCS investment and that the investment was 'commercially considered and approved'; and (ii) Ernst & Young Services Sdn Bhd ('EY') to conduct a forensic investigation. In its report, EY identified irregularities in relation to the BCS investment and suggested potential breaches of directors' duties. Based on the EY report's findings, the appellant commenced proceedings against the respondents, at the High Court, alleging breaches of fiduciary duties, duties to act in good faith, duties of care and skill and various statutory duties under the Companies Act 2016 ('CA'). The Judicial Commissioner ('JC') dismissed the appellant's claims against the respondents. Hence, the present appeal. The appellant's appeal rested on several contentions, namely: (i) the respondents failed to satisfy the requirement under s. 215(2)(b) of the CA to make an 'independent assessment' of the information provided before approving the BCS investment; (ii) the respondents lacked crucial information about BCS's financial position, corporate structure, business plan and the terms of the privatisation opportunity; (iii) the findings of the EY report clearly demonstrated breaches of directors' duties. The FH report was merely an audit report rather than a forensic investigation specifically focused on directors' duties. The High Court erred in giving greater weight to the FH report over the more comprehensive EY investigation; (iv) the High Court failed to apply the objective limb of the test in *Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors* ('*Petra Perdana*') as the JC focused solely on the directors' subjective good faith; and (v) the date of signing the DCR was critical to determining the legality and propriety of payments made on 11 January 2016. If the DCR was signed on 23 February 2016, it would have exceeded the validity period for accepting the first BCS's offer.

Held (dismissing appeal)

Per Ahmad Fairuz Zainol Abidin JCA delivering the judgment of the court:

(1a) The JC properly applied the four cumulative requirements under s. 214(1) of the CA: (i) proper purpose and good faith (s. 214(1)(a)) – the evidence established that the respondents were motivated by their assessment of what would benefit the company rather than any desire for personal gain; (ii) absence of material personal interest (s. 214(1)(b)) – there was no evidence suggesting that any respondent had a personal financial stake in the BCS investment. The investment was within the appellant's core business and the respondents stood to gain no personal advantage from the decision; (iii) adequately informed (s. 214(1)(c)) – the respondents were not making decisions in a vacuum but drawing upon their accumulated knowledge of the company's

business and the specific project. Given their expertise and experience, they had reasonable grounds to believe they possessed adequate information to assess the investment's merits; and (iv) best interest of the company (s. 214(1)(d)) – the requirement does not demand successful outcomes of perfect directors' judgment. The test focuses on reasonableness of belief at the time the decision was made, not whether subsequent events vindicated their judgment. The ultimate failure of the BCS investment did not retrospectively invalidate the reasonableness of the respondents' belief in February 2016. (paras 34-40 & 44)

(1b) The JC's application of the business judgment rule in this case properly recognised these policy considerations while ensuring that directors who act honestly and in the best interest of the company receive appropriate legal protection. (para 46)

(2) The respondents possessed substantial knowledge and experience relevant to the BCS investment. Most had served on the Board for many years and had accumulated considerable understanding of the appellant's business operations and strategic direction. This background knowledge enabled them to place the information presented on 23 February 2016 in proper context and constituted the independent assessment required by law. The High Court's finding that the respondents conducted independent assessment based on their briefing, viewed in light of their prior knowledge and extensive Board experience, was reasonable. (paras 49 & 50)

(3) The JC correctly preferred the comprehensive FH report over the incomplete and potentially biased EY investigation. Expert evidence supported the finding that the directors acted properly in approving the BCS investment. (para 74)

(4a) The Federal Court, in *Petra Perdana*, clearly established that the test for breach of duty combined both subjective and objective elements. The test is subjective in assessing the director's state of mind and whether the director genuinely considers the exercise of discretion to be in the company's best interest. The test is objective in that the director's assessment is subject to objective review by the courts. The objective element requires the court to assess whether 'an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company'. (paras 97-99)

(4b) Applying this test to the facts, several factors supported the conclusion that reasonable directors in the respondents' position could genuinely believe the BCS investment would benefit the company: (i) the investment leveraged the company's core expertise in trusted

identification technology, an area where it had demonstrated world-leading capabilities over two decades; (ii) the UK Border Force privatisation represented a substantial Government contract with significant revenue potential; (iii) the company had already invested resources in the project through staff secondment and proposal development, suggesting managements' positive assessment of its viability; (iv) the respondent brought extensive board experience and deep knowledge of the company's business to their assessment; and (v) they received briefings from experienced management with specific expertise in the relevant technology. The JC's conclusion, that the respondents' belief was objectively reasonable, was therefore well-founded and consistent with the *Petra Perdana* standard. (paras 100-102)

(5) Regardless of the signing dates, the respondents had substantial prior knowledge of the BCS project and had received appropriate briefings before making their decision. The timing of the documentation did not affect the substance of their decision-making process of the protection afforded by the business judgment rule. (para 90)

Case(s) referred to:

Goh Chan Peng & Ors v. Beyonics Technology Ltd [2017] 2 SLR 592 ***(refd)***

Howard Smith Ltd v. Ampol Ltd [1974] AC 821 ***(refd)***

Kam Thai Eng Linda & Anor v. Tan Sri Dato' Kam Woon Wah & Ors [2022] MLJU 1798 ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Peoples Department Stores Inc (Trustee Of) v. Wise [2004] 3 SCR 461 ***(refd)***

Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors [2014] CLJU 236; [2014] 1 LNS 236 HC ***(refd)***

Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors [2017] CLJU 422; [2017] 1 LNS 422 HC ***(refd)***

Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor And Other Appeals [2012] 5 CLJ 169 CA ***(refd)***

Ratnam v. Cumarasamy & Anor [1964] CLJU 237; [1964] 1 LNS 237 ***(refd)***

Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal [2018] 2 CLJ 641 FC ***(refd)***

Vita Health Laboratories Pte Ltd v. Pang Seng Meng [2004] 4 SLR 162 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 132(1), (1A), (1B), 354

Companies Act 2016, ss. 213(1), (2), 214(1)(a), (b), (c), (d), 215(2)(b), 581

Rules of Court 2012, O. 13 rr. 1, 6, 7(1)(a), O. 19 r. 7, O. 35 r. 1(2)

Other source(s) referred to:

Loh Swee Chang, *Corporate Powers Accountability,* 2018, 3rd edn, LexisNexis Malaysia Sdn Bhd, p 371

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[Editor's note: For the High Court judgment, please see Iris Corporation Bhd v. Tan Sri Razali Ismail & Ors [2022] CLJU 2614; [2022] 1 LNS 2614 (affirmed).]

Reported by Lina E

JUDGMENT

Ahmad Fairuz Zainol Abidin JCA:

Introduction

[1] This appeal arises from the decision of the learned Judicial Commissioner delivered on 18 August 2022, dismissing the appellant's claims against all nine respondents for alleged breaches of directors' duties in relation to an investment in Border Control Solutions Limited ("BCS"), a United Kingdom company. The appellant sought damages of approximately RM11.7 million (equivalent to £2.05 million) representing the total amount invested in and paid to BCS and its sole shareholder, Joseph Vijay Kumar ("JVK").

[2] Having heard comprehensive submissions from all parties and carefully considered the evidence and the High Court's reasoning, we dismiss the appeal with costs. The learned Judicial Commissioner's analysis was legally sound, factually well-grounded, and her conclusions were amply supported by the evidence before her.

Background Facts

[3] The appellant, Iris Corporation Bhd, is a public-listed company that has established itself as a pioneer in trusted identification technology. The company was the inventor of the world's first electronic passport and multiapplication electronic identification system, effectively revolutionising the trusted identification industry. For over two decades, trusted identification remained the appellant's core business and primary revenue generator.

[4] The respondents were directors of the appellant at the material time, serving in various capacities. The first respondent was the Chairman from May 2015 to August 2017. The second respondent was the Chief Executive

Officer and Managing Director from August 2013 to October 2017, having been one of the company's founders. The remaining respondents served as executive and non-executive directors with varying tenures, most having extensive experience on the appellant's Board spanning several years.

[5] The BCS investment arose from an opportunity to participate in the privatisation of the United Kingdom Border Force. BCS was incorporated in April 2015 as a special purpose vehicle to pursue this privatisation opportunity, with JVK as its sole shareholder and director until September 2016. The privatisation proposal required sophisticated trusted identification technology for immigration control purposes, falling squarely within the appellant's area of expertise.

[6] The appellant's involvement with the BCS project began in 2015, when the second respondent travelled to London and was introduced to JVK and other participants in the project. The appellant's senior staff, including Dr Gavin Hoh and Cheah Chin Hwa, were subsequently seconded to BCS to assist in developing the privatisation proposal. Equipment was also shipped and supplied to Iris Tech UK Limited, a subsidiary incorporated for the project.

[7] On 6 January 2016, BCS made a formal offer to the appellant to subscribe 10% of BCS' shares for £2 million. The appellant's Board approved this investment through a Directors' Circular Resolution ("DCR") dated 6 January 2016, though there was dispute at trial about when various directors actually signed the DCR.

[8] Between January and August 2016, the appellant made payments totalling £2.05 million in relation to the BCS investment. These payments were made both to BCS directly and to JVK personally, the latter pursuant to consultancy agreements entered into between the appellant and JVK.

[9] By October 2016, concerns had emerged about the viability of the investment. On 5 October 2016, the appellant's Board resolved to withdraw from the BCS investment, with the second respondent undertaking to procure a refund by 31 December 2016. Despite these efforts, no refund was obtained. BCS was subsequently wound up by the order of the High Court of the United Kingdom on 31 January 2018.

The Investigative Reports

[10] Two significant investigative reports were commissioned in relation to the BCS investment. On 30 May 2017, the appellant's Board engaged Ferrier Hodgson MH Sdn Bhd ("FH") to conduct a review of various projects undertaken by the appellant, including the BCS investment. In its report dated 28 July 2017, FH stated that there were no irregularities observed in the BCS investment and that the investment was "commercially considered and approved".

[11] Subsequently, on 20 February 2018, after Caprice Development had become a substantial shareholder in July 2017, the appellant commissioned Ernst & Young Services Sdn Bhd ("EY") to conduct a forensic investigation. EY produced a draft preliminary report on 16 July 2018, finalised on 19 April 2019. The EY report identified on what it characterised as irregularities in relation to the BCS investment and suggested potential breaches of directors' duties.

[12] The divergent conclusions of these two reports became a central issue in the proceedings, with the appellant relying heavily on the EY findings to support its case against the respondents.

The High Court Proceedings

[13] On 24 April 2019, the appellant commenced proceedings against the respondents, alleging breaches of fiduciary duties, duties to act in good faith, duties of care and skill, and various statutory duties under the Companies Act 2016. The appellant's case was founded primarily on the EY report's findings and contentions that the respondents had approved the BCS investment without adequate information, due diligence, or independent assessment.

[14] The learned Judicial Commissioner dismissed the appellant's claims against all respondents, finding that they had not breached their duties and were protected by the business judgment rule under ss. 214 and 215 of the Companies Act 2016. She found the respondents to be credible witnesses who had acted honestly, in good faith, and in the best interests of the company.

The Appellant's Main Contentions

[15] The appellant's case rested on several principal contentions, which may be summarised as follows.

Breach Of Independent Assessment Requirement

[16] The appellant contended that the respondents failed to satisfy the requirement under s. 215(2)(b) of the Companies Act 2016 to make an "independent assessment" of the information provided before approving the BCS investment. The appellant argued that the respondents relied entirely on representations from the second respondent and Dr Gavin Hoh without conducting proper due diligence or seeking independent verification of the information presented.

Inadequate Information For Decision-Making

[17] The appellant submitted that the respondents were not adequately informed about the subject matter of the business judgment as required by s. 214(1)(c) of the Companies Act 2016. Specifically, the appellant contended

A that the respondents lacked crucial information about BCS's financial position, corporate structure, business plan and the terms of the privatisation opportunity.

Reliance On EY Report Findings

B **[18]** Central to the appellant's case was its reliance on the EY forensic investigation report, which identified various alleged irregularities including the absence of sufficient evidence to support BCS's representations, dubious structural arrangements, lack of proper share registration and inadequate board deliberation. The appellant argued that these findings demonstrated clear breaches of directors' duties.

C

Rejection Of Ferrier Hodgson Report

[19] The appellant sought to distinguish and minimise the significance of the earlier FH report, arguing that it was merely an audit report rather than a forensic investigation specifically focused on directors' duties. The

D appellant contended that the High Court erred in giving greater weight to the FH report over the more comprehensive EY investigation.

Failure To Apply Objective Test

[20] The appellant argued that the High Court failed to apply the objective

E limb of the test established in *Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors* [2017] CLJU 422; [2017] 1 LNS 422; [2018] 2 MLJ 177, contending that the learned Judicial Commissioner focused solely on the directors' subjective good faith without conducting proper objective review of whether their decisions were reasonable.

F *Dating And Timing Issues*

[21] The appellant challenged the High Court's finding that the date of signing the DCR was immaterial, arguing that this was critical to determining the legality and propriety of payments made on 11 January 2016. The

G appellant contended that if the DCR was signed on 23 February 2016, it would have exceeded the validity period for accepting the first BCS offer.

The Respondents' Main Contentions

[22] The respondents advanced several lines of defence, which may be summarised as follows.

H

Business Judgment Rule Protection

[23] The respondents contended that their approval of the BCS investment was protected by the business judgment rule under s. 214 of the Companies Act 2016. They argued that they had satisfied all four requirements: acting

I for proper purposes and in good faith, having no material personal interest, being adequately informed and reasonably believing the decision was in the company's best interest.

Prior Knowledge And Experience

[24] The respondents emphasised their extensive prior knowledge of the BCS project and their accumulated expertise in the trusted identification industry. They argued that this background knowledge, combined with briefings received from management, provided an adequate foundation for their decision-making.

Entitlement To Rely On Management

[25] Under s. 215 of the Companies Act 2016, the respondents contended they were entitled to rely on information provided by the second respondent (as CEO and Managing Director) and Dr Gavin Hoh (as Executive Director with relevant expertise), both of whom they reasonably believed to be reliable and competent.

Criticism Of EY Investigation

[26] The respondents mounted a comprehensive challenge to the reliability and completeness of the EY investigation, highlighting that only phase 1 had been completed, no interviews were conducted with the respondents themselves and the investigation was conducted with complete hindsight knowledge of the investment's failure.

Support From FH Report

[27] The respondents relied on the earlier FH report's conclusion that the BCS investment was "commercially considered and approved" with no irregularities observed. They argued that this contemporaneous assessment by independent professionals supported the propriety of their decision-making process.

The High Court's Decision

[28] The learned Judicial Commissioner delivered a comprehensive judgment addressing all the key issues raised by the parties. Her principal findings may be summarised as follows:

(i) credibility of witnesses: In para. [64] of her judgment, she found that "the defendants were credible witnesses" and that their evidence "pointed to a collective decision to make the BCS investment" that was "taken by the defendants honestly arrived at, *bona fide* and in the best interests of the company as a whole and not exercised for an improper purpose";

(ii) application of business judgment rule: in para. [34], she concluded that the decision "in the circumstances that existed when the DCR was signed by all defendants to affect the BCS investment, appears to me to fall within the statutory business judgment rule";

(iii) prior knowledge: in paras. [20.1] and [20.2], she found material evidence that the respondents had substantial prior knowledge of the UK immigration privatisation project through various means including personal meetings, office visits and board awareness of the appellant's intended participation;

(iv) treatment of expert evidence: the learned Judicial Commissioner preferred the FH report over the EY investigation, noting in para. [35] that "EY's job was not completed – the in-depth investigation was not carried out" and that "PW6's evidence with respect, is unconvincing and to be treated with caution"; and

(v) DCR dating issue: in para. [12], she held that "the date they each signed is not of central importance" and agreed with the appellant that "the date they signed not material".

Analysis

Application Of The Business Judgment Rule

[29] We agree with the analysis of the Judicial Commissioner when she held that the statutory business judgment rule in s. 214 of the Companies Act 2016 encapsulates the common law business judgment rule as set out in *Howard Smith Ltd v. Ampol Ltd* [1974] AC 821. In that case there was a challenge to the validity of an issue of shares by the directors of a company. The court had to decide whether the said directors had been motivated by any purpose or personal gain or advantage or whether they had acted *bona fide* in the interests of the company. The judge found that the primary purpose of the allotment was to proportionately reduce the shareholdings of certain majority shareholders such that a take-over could be facilitated by another entity. It was found in those circumstances that the directors had improperly exercised their powers. The matter proceeded to the Privy Council where the Judicial Committee found, dismissing the appeal that, although the directors had acted honestly and had power to make the allotment, to alter a majority shareholding was to interfere with an element of the company's constitution which was separate from the directors' powers and accordingly, it was unconstitutional for the directors to use their fiduciary powers over the shares in the company for the purpose of destroying an existing majority or creating a new majority. Since the directors' primary object for the allotment of shares was to alter the majority shareholding, the directors had improperly exercised their powers and the allotment was invalid.

[30] In so holding the Judicial Committee commented, *inter alia*, in relation to the business judgment rule, as follows:

> ... In order to assist him in deciding upon the alternative motivations contended for, the judge considered first at some length, the objective question whether Millers was in fact in need of capital. This approach was criticised before their Lordships: it was argued that what mattered was not the actual financial condition of Millers, but what the majority directors

bona fide considered that condition to be. *Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.*

But accepting all of this, when a dispute arises whether directors of a company made a particular decision for one purpose or another, or whether there being more than one purpose, one or other purpose was the substantial or primary purpose, the court, in their Lordships' opinion, is entitled to look at the situation objectively in order to estimate how critical or pressing or substantial or, per contra, insubstantial an alleged requirement might have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme. (emphasis added)

[31] In *Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors* [2014] CLJU 236; [2014] 1 LNS 236; [2014] 11 MLJ 1 Nallini Pathmanathan J (now FCJ) explained the business judgment rule as follows:

[364] Business judgment has been defined to mean 'any decision on whether or not to take action in respect of a matter relevant to the business of the company' (see s. 132 of the Companies Act). In *Australian Securities and Investments Commission v. Rich* (2009) 75 ACSR 1 Austin J accepted a wide interpretation of the scope of 'business judgment'. The words 'in respect of, 'matter' and 'relevant' were accorded considerable breadth. As such it follows that an issue such as a shortage of cash flow and the disposal of assets falls squarely within this definition.

[365] The effect of the statutory business judgment rule in the current context is this: If the impugned directors can show that they made the decisions to affect the second and third divestments, as a business judgment within the scope of s. 132(1B) of the Companies Act 1965, then they are deemed to have met their obligations and duties as directors under statute, common law and equity. In other words, the requirements of s. 132(1A) of due care and diligence in the exercise of their duties would have been met.

[366] How then is this to be ascertained? The courts do not undertake the exercise of assessing the merits of a commercial or business judgment (see *Smith (Howard) Ltd v. Ampol Petroleum Ltd* [1974] AC 821).

[367] In the Australian case of *Australian Securities and Investments Commission v. Rich* [2009] ACSR 1 ('the *Rich* case') the enquiry related to the managing director Rich and the finance director, Silberman's failure to advise the board of directors that the company was insolvent. It should be highlighted that the statutory Australian provision equivalent to

s. 132(1B) is similar to our provision save for the use of the words 'rationally believes' rather than 'reasonably believes' in our section. While it has been argued by the American Law Institute that 'rationally believe' is considerably wider than 'reasonably believe' I am unable to subscribe entirely to that construction. Rational by definition alludes to a decision based on reason or logic. Reasonable as a word has much the same effect, namely a decision premised on logic or sense. The distinction does not therefore appear to be as wide as is suggested.

[368] *In the Rich case, Austin J set out a compendium of requirements that need to be satisfied in or order to satisfy this requirement of 'rational' belief. As 'rational' is not entirely dissimilar to 'reasonable' it appears that the criteria set out in Rich's case are applicable under s. 132(1B).* Austin J. held there that reasonableness should be assessed by reference to:

a. the *importance* of the business judgment that is to be made;

b. the *time available* for obtaining information;

c. the *costs* related to obtaining information;

d. the *director's confidence* in exploring the matter;

e. *the state of the company's business at that time* and the nature of the competing demands on the board's attention; and

f. *whether or not the information is available* to the director

[370] Reference was made to *Maple Leaf Foods Inc v. Schenieder Corp* (1998) 42 OR (3d) 177:

> *The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a reasonable decision not a perfect decision. Provided that the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision. This formulation of deference to the decision of the Board is known as the "Business judgment rule". The fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction.*
>
> (emphasis added)

The Applicable Law

[32] We accept the analysis by the Judicial Commissioner on the applicable law where she held "Although the alleged cause of action took place in 2016, the Companies Act 2016 ("CA 2016") came into effect on 31 January 2017. The law to be applied is the CA 2016 as the suit was filed after the CA 2016 became effective – see *Kam Thai Eng Linda & Anor v. Tan Sri Dato' Kam Woon Wah & Ors* [2022] MLJU 1798. At any rate, this will

not make any earth-shaking difference as ss. 132(1), (1A) and (1B) of the Companies Act 1965 ("CA 1965" has been re-enacted as ss. 213(1), (2) and 214 of the CA 2016; s. 354, CA 1965 is in *pari materia* with s. 581 of the CA 2016. This will become relevant when considering the cases decided under ss. 132(1), (1A) and (1B) of the CA 1965 such as *Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors* [2014] CLJU 236; [2014] 1 LNS 236; [2014] 11 MLJ 1; *Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor And Other Appeals* [2012] 5 CLJ 169; [2012] 3 MLJ 616; *Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal* [2018] 2 CLJ 641; [2018] 2 MLJ 177.

[33] Section 214 of the Companies Act 2016 reads as follows:

> Business judgement rule
>
> 214. (1) A director who makes a business judgment is deemed to meet the requirements of the duty under subsection 213(2) and the equivalent duties under the common law and in equity if the director –
>
> (a) makes the business judgment for a proper purpose and in good faith;
>
> (b) does not have a material personal interest in the subject matter of the business judgment;
>
> (c) is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and
>
> (d) reasonably believes that the business judgment is in the best interest of the company.
>
> (2) For the purposes of this section, "business judgment" means any decision on whether or not to take action in respect of a matter relevant to the company's business.

[34] It is our view that the learned Judicial Commissioner properly applied the four cumulative requirements under s. 214(1) of the Companies Act 2016. We agree with her analysis that each requirement was satisfied on the evidence before her.

Proper Purpose And Good Faith – s. 214(1)(a)

[35] The High Court's finding in para. [64] that "a decision taken by the defendants honestly arrived at, *bona fide* and in the best interests of the company as a whole and not exercised for an improper purpose" was amply supported by the evidence. The learned Judicial Commissioner assessed the credibility of the witnesses and found the respondents to be credible, noting that while there were minor discrepancies in their evidence, these did not detract from the overall finding of honest decision-making.

[36] The evidence established that the respondents were motivated by their assessment of what would benefit the company rather than any desire for personal gain. Their long service on the Board and continued involvement even during the company's subsequent financial difficulties supported the inference that they were genuinely motivated by the company's interests.

Absence Of Material Personal Interest – s. 214(1)(b)

[37] There was no evidence suggesting that any respondent had a personal financial stake in the BCS investment. The investment was within the appellant's core business, and the respondents stood to gain no personal advantage from the decision. This requirement was clearly satisfied.

Adequately Informed – s. 214(1)(c)

[38] The High Court's findings established that the respondents had substantial prior knowledge of the UK immigration privatisation project through various means including personal meetings, office visits and Board awareness of the appellant's intended participation. The briefing provided on 23 February 2016, viewed against this background knowledge, was sufficient to satisfy this requirement.

[39] The respondents were not making decisions in a vacuum but drawing upon their accumulated knowledge of the company's business and the specific project. Given their expertise and experience, they had reasonable grounds to believe they possessed adequate information to assess the investment's merits.

Best Interest Of The Company – s. 214(1)(d)

[40] It is appropriate to mention that what is in the best interest of the company is dependent on the facts of each case. It is never set. In *Corporate Powers Accountability,* 3rd edn, author Loh Swee Chang at p. 371 made the following observations:

> There are in theory a wide range of interest for directors to consider and which particular interest in the company's best interest at the time decision making is required is a matter of prioritisation according to the issues confronting the company. In *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v. Petra Perdana Berhad*, the Federal Court recognised that a company's interest may not have the same meaning in all cases. There is bound to be the existence and overlapping of different interest in a given case. Where different interests exist each interest will generally be accorded a different degree of emphasis and it is here that the use of the phase will yield a different meaning. *Wherein lies the interest of the company, in the final analysis, is a question of fact. What the law requires from directors is good faith in their subjective analysis as to where the 'interests of the company' lies but the test is not entirely subjective: Tengku Dato' Ibrahim Petra bin Tengku Indra Petra. There must be evidence of independent judgment, discretion and consideration of relevant matters which when taken as a whole, may properly be described as being relevant to the interest of the company: Pioneer Haven.*
>
> (emphasis added)

[41] The best interest of the company warrants detailed examination as it forms the cornerstone of business judgment rule protection. The requirement embodies both subjective and objective elements, as established by the Federal Court in *Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal* [2018] 2 CLJ 641; [2018] 2 MLJ 177. Azahar Mohamed FCJ held as follows:

> [165] What then is the true test for breach of duty as a director to act in good faith and in the 'best interest of the company'? The question is whether it is a subjective or objective test to judge whether directors acted in the best interest of the company. It is to this we now turn.
>
> [166] **In our judgment, the correct test combines both subjective and objective tests.** The test is subjective in the sense that the breach of the duty is determined on an assessment of the state of mind of the director; the issue is whether the director (not the court) considers that the exercise of discretion is in the best interest of the company. In this regard, in *Corporate Law* by Hans Tjio, Pearlie Koh and Lee Pey Woan at p. 361, the learned authors said that the director's conduct is tested by reference to an essentially subjective barometer. The classic formulation of the subjective element in the test is found, as we have discussed earlier at para 157, in *Re Smith & Fawcett*, *Limited* in which Lord Greene MR said that 'directors must exercise their discretion *bona fide* in what they consider – not what a court may consider – is in the interest of the company'. The duty is to act in what the director believes, not what the court believes, to be the best interest of the company.
>
> The subjective nature of the test can be seen in *Regentcrest Plc (in liq) v. Cohen* [2001] BCC 494 where Jonathan Parker J said:
>
> > ... the question whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test.
>
> [167] The test is objective in the sense that the director's assessment of the company's best interest is subject to an objective review or examination by the courts. In an article entitled *Directors' Duty to Act in the Interests of the Company: Subjective or Objective?* [2015] JBL Issue 2, the writers said that courts have introduced objective elements into the duty to act in good faith and in the best interest of the company to address the problem identified by Browen LJ in *Hutton v. West Cork Railway Company* (1883) 23 Ch D 654 at p 671 where the learned judge said:
>
> > *Bona fide*s cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly *bona fide* yet perfectly irrational. **The test must be what is reasonably incidental to, and within the reasonable scope of carrying on, the business of the company.** (emphasis added)

[42] In considering the subjective element, the test requires assessment of whether the directors genuinely believed the decision would benefit the company. The High Court's finding that the decision was "honestly arrived at, *bona fide* and in the best interests of the company as a whole" addresses this subjective component. It would be wrong for a court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision on such a question, if *bona fide* arrived at. (See *Howard Smith Ltd v. Ampol Ltd* (*supra*)).

[43] In considering the objective element, the court must evaluate whether such belief was reasonable in the circumstances. Several factors support the reasonableness of the respondents' belief:

(i) alignment with core business

The BCS project involved privatisation of the UK Border Force, requiring sophisticated trusted identification technology – precisely the appellant's area of expertise for over two decades. The respondents could reasonably believe that participating in such a high-profile project would enhance reputation, demonstrate capabilities and establish a foothold in the UK government market;

(ii) scale of opportunity

The privatisation represented a substantial government contract with significant revenue potential. While the £2.05 million investment was substantial, evidence indicated it was within the company's financial capacity and the risk-reward profile appeared favourable;

(iii) directors' knowledge and assessment

The reasonableness of belief must be assessed against the respondents' knowledge and available information. Their background knowledge of the project, combined with their expertise in trusted identification technology, enabled them to understand how the investment fitted within the company's strategic framework; and

(iv) absence of improper purposes

The decision was not made for improper purposes or personal benefit. The evidence supported that respondents were genuinely motivated by perceived company's interests rather than self-serving conduct.

[44] Crucially, the requirement does not demand successful outcomes or perfect directors' judgment. The test focuses on reasonableness of belief at the time the decision was made, not whether subsequent events vindicated their judgment. The ultimate failure of the BCS investment does not retrospectively invalidate the reasonableness of the respondents' belief in February 2016.

[45] The business judgment rule serves important policy objectives in encouraging competent individuals to serve as directors and in promoting legitimate business risk-taking. If directors faced personal liability for every business decision that ultimately proved unsuccessful, qualified individuals would be deterred from serving on company boards and those who did serve would adopt excessively conservative approaches that could stifle business growth and innovation.

[46] The learned Judicial Commissioner's application of the business judgment rule in this case properly recognised these policy considerations while ensuring that directors who act honestly and in the best interest of the company receive appropriate legal protection.

The Independent Assessment Requirement Under s. 215

[47] Section 215 of the Companies Act 2016 reads as follows:

> Reliance on information provided by others
>
> 215. (1) A director in exercising his duties as a director may rely on information, professional or expert advice, opinions, reports or statements including financial statements and other financial data, prepared, presented or made by –
>
> (a) any officer of the company whom the director believes on reasonable grounds to be reliable and competent on the matters concerned;
>
> (b) as to matters involving skills or expertise, any other person retained by the company in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence;
>
> (c) another director in relation to matters within the director's authority; or
>
> (d) any committee to the board of directors on which the director did not serve in relation to matters within the committee's authority.
>
> (2) The director's reliance made under subsection (1) is deemed to be made on reasonable grounds if it was made –
>
> (a) in good faith; and
>
> (b) after making an independent assessment of the information or advice, opinions, reports or statements, including financial statements and other financial data, having regard to the director's knowledge of the company and the complexity of the structure and operation of the company.

[48] The appellant's primary complaint focused on the alleged failure to conduct "independent assessment" as required by s. 215(2)(b). However, this argument misconceives the nature of the requirement. Independent assessment does not mandate comprehensive due diligence or sceptical

A inquiry, but rather an unbiased analysis of information provided, having regard to the director's knowledge of the company and complexity of its operations.

[49] The respondents possessed substantial knowledge and experience relevant to the BCS investment. Most had served on the board for many years
B and had accumulated considerable understanding of the appellant's business operations and strategic direction. This background knowledge enabled them to place the information presented on 23 February 2016 in proper context and constituted the independent assessment required by law.

C **[50]** The High Court's finding that the respondents conducted independent assessment based on their briefing, viewed in light of their prior knowledge and extensive board experience, was reasonable. The requirement is that assessment be "independent, not that it be comprehensive or conducted from a position of scepticism".

D **[51]** Given the facts of this case where the nature of the appellant's venture into the business of border control utilising its technical know-how leveraging the appellant's past experience in the industry was common knowledge to the respondents, it would not require an assessment that is complex and extensive. It would be a different issue if the venture was
E outside the realm of the usual business activity of the appellant.

[52] The appellant's contention that determining whether the respondents made a reasonable business judgment is purely a question of law for the court is misconceived. While the legal test is indeed for the court to determine, the factual matrix upon which that determination is made necessarily includes
F evidence from witnesses with relevant knowledge and expertise.

[53] The argument of the appellant on this issue is therefore without merits and border on knitpicking.

Application Of The Business Judgment Rule Without Hindsight Bias

G **[54]** In evaluating the respondents' decision to approve the BCS investment, this court is mindful of the principle that business decisions must not be assessed with the benefit of hindsight. The dangers of hindsight bias in the evaluation of commercial decisions have been recognised across multiple jurisdictions and form a cornerstone of the business judgment rule.

H **[55]** The Supreme Court of Canada in *Peoples Department Stores Inc (Trustee of) v. Wise* [2004] 3 SCR 461 aptly warned against this judicial pitfall at para. 64:

> Business decisions must sometimes be made with high stakes and under considerable time pressure in circumstances in which detailed information
I is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information

> that becomes available *ex post facto*. Because of this risk of hindsight bias, Canadian courts have developed a rule of defence to business decisions called the 'business judgment rule'.

[56] Similarly, the Singapore Court of Appeal in *Goh Chan Peng and Others v. Beyonics Technology Ltd* [2017] 2 SLR 592; [2017] SGCA 40 emphasised judicial restraint in the face of retrospective analysis:

> Thus, a court will be slow to interfere with commercial decisions made honestly but which, on hindsight, were financially detrimental to the company.

[57] Consistent with these authorities, this court is of the respectful view that it ought not to determine the decision by the respondents to undertake the BCS investment on account of *post facto* information. That decision, made in the circumstances that existed when the DCR was signed by all respondents to effect the BCS investment, appears to this court to fall within the statutory business judgment rule under ss. 214 and 215 of the Companies Act 2016.

[58] The "*post facto* information" in this case primarily consisted of the evidence by the appellant's witness, PW6 of EY who rendered her opinion on what should have been done to safeguard the appellant's interest in the BCS investment. This court rejects this evidence as it is derived from incomplete forensic findings and represents the very type of retrospective analysis that the business judgment rule is designed to prevent.

[59] This court has applied the objective test mandated by the Federal Court in *Petra Perdana*, but crucially, without utilising hindsight as a basis to ascertain whether the respondents acted in accordance with their fiduciary duties or their duty of care as honest and intelligent persons in their position.

[60] It was not a perfect decision on hindsight, but being a business decision taking into account the appellant's core business, the directors were entitled to have some level of confidence in deciding to approve the BCS investment, particularly since staff had been seconded since 2015 to the UK and the appellant had assisted in the submission of the proposal to the home office.

[61] The respondents were aware of the inherent risk in making the BCS investment, which depended on the BCS proposal being accepted by the UK Government, and they acted without the benefit of hindsight. This court has focused on what the respondents believed at the material time rather than what this court might believe years later with the advantage of hindsight to scrutinise with a probing eye the efficacy and reasonableness of information, data or disclosures then provided, which would inevitably affect their sanctity.

[62] Matters which are obvious in retrospect may have been far from clear at the material time. As recognised in *Howard Smith Ltd v. Ampol Petroleum Ltd* (*supra*) and affirmed by the Federal Court in *Petra Perdana*, courts should not pass judgment on the merits of business decisions taken in good faith in the boardroom or substitute the board's decision with the court's own, even if on hindsight such decisions may seem incorrect or imprudent.

[63] This court cannot view the respondents' decision to make the BCS investment with the advantage of hindsight, recognising that they might well have made a different decision with such knowledge. To do so would be overly restrictive and would discourage and kill entrepreneurship. As noted in *Vita Health Laboratories Pte Ltd v. Pang Seng Meng* [2004] 4 SLR 162, directors should not be coerced into exercising defensive commercial judgment, motivated largely by anxiety over legal accountability based on retrospective analysis.

[64] The business judgment rule exists, in part, to protect directors from the unfair application of hindsight bias in judicial review of their decisions. This protective principle is essential to maintaining an environment where qualified individuals will serve as directors and where legitimate business risk-taking is encouraged rather than penalised through retrospective judicial scrutiny.

[65] Accordingly, it is this court's finding that the BCS investment decision was made strictly within the timeline of the information and circumstances available to the respondents at the material time, without reference to subsequent developments or information that became available only after the investment decision was made.

The Court's Assessment Of Competing Expert Reports

[66] This court has carefully considered the competing expert reports and finds that the Judicial Commissioner was entirely correct in preferring the FH report over the EY investigation for the following reasons.

Deficiencies In The EY Investigation

[67] The EY investigation suffered from several deficiencies that rendered it unreliable and incomplete. Most significantly, EY only completed Phase 1 of what was intended to be a two-phase investigation. Phase 2, which would have investigated "whether irregularities were done intentionally or whether anyone within the company has benefited from the project", was never carried out. Without this crucial second phase, EY's conclusions were necessarily preliminary and incomplete.

[68] Further, EY failed to conduct interviews with the relevant directors who had made the investment decision, stating that they "did not conduct interviews with relevant persons involved as they have all resigned". This represented a fundamental methodological flaw, as the assessment of

directors' duties necessarily involves consideration of subjective factors such as good faith, state of mind and the reasonableness of beliefs held at the time of decision-making.

Credibility Of PW6

[69] The credibility of PW6, EY's representative, was seriously undermined by several factors. She admitted that as a forensic auditor, EY was only looking at whether an independent valuation had been carried out but would not be able to comment on the actual valuation as she was not a specialist in border control. She further acknowledged that EY was not in a position to comment on the BCS project as she had not visited the BCS office and had only reviewed potentially incomplete documents.

[70] PW6's reliability as key witness was also called into question after she was confronted with an incorrect statement regarding the FH report. She initially claimed in her witness statement that the FH report's "findings and observations were not attached with supporting documents such as board Minutes". When shown that Board minutes were in fact attached to the FH report, she refused to acknowledge her error.

Reliability Of The FH Report

[71] The FH report was demonstrably more reliable than the EY investigation. First, it was conducted much closer in time to the relevant events, being commissioned in May 2017, less than 18 months after the investment decision. This temporal proximity provided better access to contemporaneous records and recollections. Second, as PW6 herself admitted, "the scope of the FH Report was wider than that of the Phase 1, EY Report".

[72] Most importantly, the FH report was commissioned by the appellant's original board, including directors who had been involved in the BCS investment decision, suggesting that it was motivated by genuine concern about the investment's propriety rather than by subsequent litigation strategy.

[73] The timing of the EY investigation raises serious questions about its motivation and reliability. EY was commissioned in February 2018, after new management had acquired control and after BCS had been wound up. The evidence supports the contention that this investigation was influenced by new management's desire to find fault with previous decisions, particularly given that the previous management "was not earlier supportive of the entry of Caprice as shareholder".

[74] For these reasons, this court finds that the Judicial Commissioner correctly preferred the comprehensive FH report, which concluded that the BCS investment was "commercially considered and approved" with "no

irregularities observed", over the incomplete and potentially biased EY investigation. The expert evidence supports the finding that the directors acted properly in approving the BCS investment.

Liability Of The Second Respondent

The Second Respondent's Unique Position And Responsibilities

[75] The second respondent occupied a unique position as Chief Executive Officer and Managing Director, bearing primary responsibility for day-to-day management and being the principal architect of the BCS investment. The appellant's case against him involved additional allegations beyond those made against other respondents, including claims related to his appointment of JVK as consultant and consultancy payments.

[76] Having carefully considered the appellant's submissions and the High Court's analysis, we are satisfied that the learned Judicial Commissioner correctly absolved the second respondent from liability. Her reasoning demonstrates proper application of relevant legal principles to his specific conduct. Among them are.

Business Judgment Rule Protection For The Second Respondent

[77] The learned Judicial Commissioner correctly applied the business judgment rule to protect the second respondent's decisions. As noted in para. [64] of her decision, she ruled that the second respondent's decision was part of "a collective decision to make the BCS investment" that was "honestly arrived at, *bona fide* and in the best interests of the company as a whole".

[78] His position as CEO and Managing Director did not disqualify him from business judgment rule protection. Indeed, as the senior executive responsible for implementing board strategy, he was peculiarly qualified to assess the BCS investment's merits. The evidence established his involvement with the project since early 2015, providing substantial knowledge and experience.

The Appointment Of JVK As Consultant

[79] The appellant's pleaded case relates to the second respondent's appointment of JVK as consultant and related payments. The Judicial Commissioner correctly found these actions fell within his authority as Managing Director and were protected by the business judgment rule.

[80] As Managing Director, he possessed broad authority to manage day-to-day operations, including appointing consultants necessary for the company's business. JVK possessed relevant expertise in government contracting and border security, having been instrumental in developing the privatisation proposal. His appointment served a legitimate business purpose.

[81] The consultancy payments were reasonable in amount and frequency, reflecting the value of JVK's services. The fact that JVK was BCS's sole shareholder did not automatically create disqualifying conflict, particularly given that BCS and appellant interests were aligned in securing the privatisation contract.

Good Faith And Absence Of Personal Interest

[82] The High Court's finding that the second respondent acted in good faith without improper personal interest was well-supported. His credibility assessment by the Judicial Commissioner in para. [64] noted that his "testimony under intensive cross-examination did not waiver, nor compromise his defence".

[83] No evidence suggested he obtained personal financial benefit from the BCS investment or JVK's appointment. His decisions appeared motivated by company benefit assessment rather than personal gain. His continued efforts to recover invested funds after withdrawal decision further supported genuine motivation by company interests.

[84] The learned Judicial Commissioner was therefore correct when she dismissed the claim against the second respondent.

Dating Issue And Timing Concerns Of The Directors' Circular Resolution (DCR)

[85] The appellant challenged the High Court's finding that the DCR signing date was immaterial, arguing this was critical to determining payment legality and propriety. The learned Judicial Commissioner's approach in para. [12] that "the date they each signed is not of central importance" was not wrong and consistent with established legal principles.

[86] It is our view that the focus should be on the substance of the directors' decision-making rather than technical procedural matters that do not affect the validity of their business judgment. What matters is whether the directors made an informed decision in good faith, not the precise chronology of documentation.

[87] The appellant's contention that signing the DCR on 23 February 2016 would have exceeded the seven-day validity period for accepting the first BCS offer is overly simplistic and does not reflect commercial reality. We accept that business negotiations frequently involve extensions and modifications of initial timeframes, and the evidence did not establish that the original offer had lapsed irretrievably.

[88] More fundamentally, even if there were issues with the timing of acceptance, this would not automatically constitute breach of directors' duties if the decision-making process was otherwise proper.

[89] The learned Judicial Commissioner correctly recognised that the precise signing dates were not material to the central legal issues. Whether directors signed on 6 January 2016 or 23 February 2016, the key question remained whether they acted with appropriate care, in good faith and in the company's best interests based on the information available to them.

[90] The evidence established that regardless of signing dates, the respondents had substantial prior knowledge of the BCS project and received appropriate briefings before making their decision. The timing of documentation did not affect the substance of their decision-making process or the protection afforded by the business judgment rule.

Adverse Inference Against The Appellant

[91] As established in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, adverse inference can be drawn for "non-production of not just any witness but an important and material witness to the case". The deliberate withholding of evidence is inferred if there is no reasonable explanation for not calling a material witness.

[92] The appellant failed to proffer any reason why these material witnesses were not called. Dr Gavin Hoh, in particular, was central to the BCS project and possessed unique knowledge about its development and viability. His absence from the witness list, without explanation, properly supported the inference that his evidence would not have assisted the appellant's case.

[93] Be that as it may, we do not find this issue to be critical in the overall assessment of the appeal. To our mind, even if the Judicial Commissioner had unduly invoked an adverse inference against the appellant, it did not nullify the overwhelming evidence in support of the respective respondents' case. This included the evidence proffered by the appellant's own witness such as PW1.

[94] PW1 was not merely any witness but the appellant's own Chief Executive Officer at the material time. PW1's testimony contained several critical admissions that fundamentally undermine the appellant's case:

(i) PW1 explicitly agreed that "the board made a reasonable business judgment decision when it decided to approve the BCS investment at £2 million on 23 February 2016". This direct admission by the appellant's own CEO is fatal to the claim that the respondents breached their directors' duties;

(ii) PW1 acknowledged that investing in BCS at its early stage gave the appellant a "competitive edge". This admission supports the commercial rationale behind the respondents' decision and demonstrates that the investment was made for proper business purposes; and

(iii) PW1's testimony revealed the strategic necessity of the investment when he:

(a) agreed that refusing to fund BCS would mean the appellant would not get the competitive edge;

(b) acknowledged that BCS would be at liberty to charge higher prices later if the project was secured without early investment;

(c) confirmed that not investing would mean losing the advantage of participating in the privatisation project; and

(d) testified that the directors were entitled to rely on the expertise of Dr Gavin Ho and the second respondent, and that there was no evidence or reason for the board to question their motives.

[95] As correctly observed by the High Court in para. [36] of the grounds of decision, "the evidence of the plaintiff's own witnesses, particularly PW1 and PW6 considered as a whole, imploded the plaintiff's case".

The Objective vs Subjective Test Analysis

[96] The appellant argued that the High Court failed to apply the objective limb of the test established in *Petra Perdana*, contending that the learned Judicial Commissioner focused solely on directors' subjective good faith without proper objective review of whether their decisions were reasonable.

The Petra Perdana Test

[97] As stated earlier, the Federal Court in *Petra Perdana* clearly established that the test for breach of duty combines both subjective and objective elements.

[98] Therefore, the test is subjective in assessing the director's state of mind and whether the director genuinely considers the exercise of discretion to be in the company's best interest. The test is objective in that the director's assessment is subject to objective review by the courts.

The Objective Element Applied

[99] The objective element requires the court to assess whether "an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company".

[100] Applying this test to the facts, several factors support the conclusion that reasonable directors in the respondents' position could genuinely believe the BCS investment would benefit the company. First, the investment leveraged the company's core expertise in trusted identification technology, an area where it had demonstrated world leading capabilities over two decades. Second, the UK Border Force privatisation represented a substantial government contract with significant revenue potential.

[101] Third, the company had already invested resources in the project through staff secondment and proposal development, suggesting management's positive assessment of its viability. Fourth, the respondents brought extensive Board experience and deep knowledge of the company's business to their assessment. Fifth, they received briefings from experienced management with specific expertise in the relevant technology.

[102] The learned Judicial Commissioner's conclusion that the respondents' belief was objectively reasonable was therefore well-founded and consistent with the *Petra Perdana* standard.

Section 581 Relief Analysis

[103] Section 581 reads as follows:

> Power to grant relief
>
> 581. (1) In any proceeding for negligence, default, breach of duty or breach of trust against any person to whom this section applies, if it appears to the Court before which the proceedings are taken that a person is or may be liable, but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case, he ought fairly to be excused for the negligence, default or breach, the Court may relieve him either wholly or partly from his liability on such terms as the Court thinks fit.
>
> (2) If any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the Court for relief, and the Court shall have the same power to relieve him as under this section it would have had if it had been a Court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought.
>
> (3) This section applies to –
>
> (a) an officer of a corporation;
>
> (b) a person employed by a corporation as an auditor, whether he is or is not an officer of the corporation;
>
> (c) an expert within the meaning of this Act;
>
> (d) a liquidator or person who is appointed by the Court, receiver, receiver and manager or judicial manager that carries out any duty under this Act in relation to a corporation; and
>
> (e) a nominee appointed under a voluntary arrangement to carry out any duty under this Act in relation to a corporation.

[104] Reference is again made to the decision by Nallini J in *Petra Perdana* (*supra*) where she discussed the test to be adopted in determining a breach of fiduciary duty. Her Ladyship held as follows:

> [238] ... The test is nicely condensed in Ford's *Principles of Corporations Law* (para 8.060), that there will be a breach of duty if the act or decision is shown to be one which no reasonable board could consider to be within the interest of the company.
>
> [239] This test is adopted in *Charterbridge Corpn Ltd v. Lloyds Bank Ltd* [1970] Ch 62 at p 74, in that, to challenge a decision of the directors the test is whether:
>
> > *... an intelligent and honest man in the position of the director of the company concerned, could in the whole of the existing circumstances have reasonably believed that the transactions were for the benefit of the company.*
>
> [240] The above principle is often referred to as the '*Charterbridge* Principle'.
>
> [242] It is important to note, following high authority, such as *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] AC 821, that the court does not substitute its own decision with that of the directors, since the decision of the directors to enter into the JDA is a management decision.

[105] Even if the respondents' conduct could be characterised as constituting some breach of duty, which we do not find, the learned Judicial Commissioner's alternative analysis under s. 581 of the Companies Act 2016 provides additional grounds for absolving them from liability.

[106] The learned Judicial Commissioner ruled "it is always easy, with hindsight, to apportion liability, when in actuality the acts and omissions may more reasonably be attributable to inadvertence and unforeseen circumstances" and that "it is certainly arguable and persuasively so that the defendants ought fairly to be excused for their negligence, default or breach of duty (if any)".

[107] Section 581 empowers the court to relieve directors from liability where they have acted honestly and reasonably and ought fairly to be excused. This provision recognises that commercial decisions involve inherent uncertainties and that honest errors in business judgment should not automatically result in personal liability for directors.

[108] The provision requires three elements: honesty, reasonableness, and fairness of excuse. The evidence established that the respondents acted honestly throughout the relevant period, believing that their decisions would benefit the company. Their actions were also reasonable given their knowledge of the company's business, their experience in the industry, and the information available regarding the BCS project.

[109] Considering all circumstances, including the respondents' long service to the company, their expertise in the relevant field, the genuine commercial rationale for their decisions and the absence of any personal benefit, it would be unfair to impose liability upon them for what were ultimately honest errors in commercial judgment, if indeed they were errors at all.

[110] The BCS investment represented a reasonable business opportunity that aligned with the company's strategic interests and technical capabilities. The fact that external circumstances prevented its successful completion does not justify imposing personal liability on directors who acted in good faith and with reasonable care.

[111] We find the *Charterbridge* principle applicable and the Judicial Commissioner was not wrong in applying s. 581.

The Treatment Of The Eighth Respondent

[112] The eighth respondent did not appear at trial or give evidence, despite having been properly served with the proceedings through substituted service ordered by the court on 3 July 2019. The appellant contended that judgment should have been entered against him based on O. 35 r. 1(2) of the Rules of Court 2012.

[113] While the appellant correctly cited O. 35 r. 1(2) which permits a court to proceed with trial in a party's absence, this general provision does not override the specific procedural requirements for obtaining default judgment. The learned Judicial Commissioner was right to conclude that "O. 13 r. 1 and O. 35 r. 1 do not avail the plaintiff".

[114] However, we agree with the learned Judicial Commissioner in her finding that she was not at liberty to waive production by the appellant of a certificate of non-appearance in Form 12 as required mandatorily under O. 13 r. 7(1)(a) of the Rules of Court 2012.

[115] The certificate of non-appearance in Form 12 is a statutory prerequisite that cannot be dispensed with, regardless of whether substituted service has been effected. The fact that the eighth respondent was served *via* substituted service on 5 August 2019 does not excuse compliance with this fundamental procedural requirement.

[116] The Judicial Commissioner correctly identified that the appellant's claims fell under "other claims" pursuant to O. 13 r. 6 of the ROC 2012. This classification has significant procedural consequences that the appellant failed to appreciate. Order 13 r. 6 reads as follows:

> Other claims (O.13, r. 6)
>
> 6. (1) Where a writ is endorsed with a claim of a description not mentioned in rules 1 to 4, then, if any defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing and upon filing an affidavit proving due service of the writ on that defendant and, where the statement of claim was not endorsed on or served with the writ, upon serving a statement of claim on him, proceed with the action as if that defendant had entered an appearance.

(2) Where a writ issued against a defendant is endorsed as aforesaid, but by reason of the defendant satisfying the claim or complying with the demands thereof or any other like reason it has become unnecessary for the plaintiff to proceed with the action, then, if the defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter judgment with the leave of the Court against that defendant for costs.

(3) An application for leave to enter judgment under paragraph (2) shall be by notice of application which must, unless the Court otherwise orders, and notwithstanding anything in Order 62, rule 10, be served on the defendant against whom it is sought to enter judgment.

[117] Under O. 13 r. 6, when an action involves "other claims", the established procedure is clear – if a defendant fails to enter an appearance, "the plaintiff may ... proceed with the action as if that defendant had entered an appearance". The rule expressly precludes the entry of judgment in default of appearance for such claims.

[118] Having correctly classified the action under O. 13 r. 6, the proper procedural sequence required the appellant to subsequently invoke O. 19 r. 7 (judgment in default of defence) if the eighth respondent failed to file a defence.

[119] The absence of any notice of application to obtain judgment in default of defence and the failure to serve such application on the eighth respondent constituted a fundamental procedural defect that could not be overlooked.

[120] We must reiterate the established principle from *Ratnam v. Cumarasamy & Anor* [1964] CLJU 237; [1964] 1 LNS 237; [1965] 1 MLJ 228 that "The Rules of Court must *prima facie* be obeyed". This principle is not merely aspirational but represents a fundamental tenet of procedural law.

[121] The Rules of Court exist to ensure orderly administration of justice and protect the rights of all parties. They cannot be bypassed merely because a party chooses not to participate in proceedings. To allow otherwise would undermine the integrity of the civil justice system.

[122] The appellant's failure to comply with mandatory procedural requirements cannot be excused by the eighth respondent's non-participation. Had the appellant followed the correct procedural sequence under O. 13 and O. 19 of the Rules of Court 2012, the outcome may well have been different.

[123] For these reasons, we find no error in the learned Judicial Commissioner's approach and affirm her decision to refuse judgment against the eighth respondent.

[124] Importantly, the evidence established that the BCS investment was a collective Board decision made after appropriate briefings and deliberation. The eighth respondent's participation in this collective decision-making process was not materially different from that of the other respondents who did testify.

[125] Given that the appellant failed to establish breach of duties against the respondents who did appear and testify, there were no grounds for finding such breach against the eighth respondent based solely on his non-appearance.

Assessment Of Appellant's Alternative Arguments

The Misrepresentation Claims

[126] The appellant contended that the second respondent misled the Board by causing payments totalling £1.4 million when he had represented that estimated costs would be approximately £600,000, and by representing that no more than £1 million would be disbursed when £1.8 million had already been paid.

[127] The High Court correctly found that these allegations did not establish breach of directors' duties by the other respondents. Business circumstances often require adjustments to initial projections and the evidence did not establish that these variations were made dishonestly or without reasonable business justification.

[128] Moreover, the business judgment rule specifically protects directors from liability for honest errors in commercial judgment. The fact that actual expenditure exceeded initial estimates does not automatically constitute breach of duty, particularly where the variations occurred in response to evolving business circumstances.

The Recovery Efforts Claim

[129] The appellant criticised the respondents for failing to recover the invested funds despite undertakings given at various board meetings. However, the evidence established that recovery efforts were delegated to management and that external circumstances, including BCS's ultimate winding up, made recovery impossible.

[130] The failure to achieve recovery does not constitute breach of directors' duties where the failure resulted from factors beyond the directors' reasonable control. The respondents' decision to delegate recovery efforts to management was appropriate given their respective roles and responsibilities.

The Equipment Transfer Allegations

[131] The appellant's allegations regarding equipment transfers to Iris Tech UK worth £168,538.34 were not established to constitute breaches of duty by the respondents other than the second respondent. These transfers appeared to be operational matters within the management's authority rather than Board-level decisions requiring specific director approval.

[132] Even if these transfers were improper, which was not established, they would not affect the business judgment rule protection available to the respondents for their approval of the BCS investment itself.

No Appellate Intervention Required

[133] The law on appellate intervention to findings of fact is well-settled. An appellate court does not interfere with the trial judge's conclusions on primary facts unless it is satisfied that the trial judge was "plainly wrong".

[134] We are guided by the decision of the Federal Court in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] MLJU 1469, where the Federal Court held that in applying the "plainly wrong" test, a higher court can overturn a lower court's decision if it finds the lower court's factual findings to be demonstrably incorrect or unreasonable. This test essentially means that an appellate court will only interfere with a lower court's decision if it is so clearly wrong that no reasonable judge could have reached that conclusion based on the evidence presented.

[135] The "plainly wrong" test operates on the principle that the trial court has had the advantage of seeing and hearing the witnesses and their evidence, as opposed to the appellate court that acts on the printed records. As the Federal Court noted in *Ng Hoo Kui*, this principle recognises the trial judge's superior position in assessing credibility and weighing evidence.

[136] The Federal Court in *Ng Hoo Kui* at para. [54] identified several non-exhaustive examples that satisfy the "plainly wrong" test, including material error of law, critical factual findings which had no basis in evidence, demonstrable misunderstanding of relevant evidence, demonstrable failure to consider relevant evidence, misdirection by the judge, absence of evidence to support a particular conclusion, material inconsistencies or inaccuracies and failure by the trial judge to appreciate the weight and bearing of circumstances admitted or proved.

[137] In applying the "plainly wrong" test, it is our view that the learned Judicial Commissioner had properly considered all relevant evidence. She did not make any significant errors in interpreting the law or reach conclusions that are not supported by the facts on the record.

[138] The appellant's various criticisms of the High Court's findings constitute disagreements with the learned Judicial Commissioner's conclusions rather than demonstrations that those conclusions were plainly wrong. As the Federal Court noted in *Ng Hoo Kui* at para. [151], "It is not sufficient for the Court of Appeal to reverse the findings on fact merely because on a particular point of evidence, it disagreed with the conclusion made by the trial court on whether one party or the other is to be believed on the evidence that they gave in court".

[139] Her comprehensive analysis of the evidence, proper application of legal principles and reasoned conclusions demonstrate careful judicial consideration of all relevant factors. The High Court's findings were based on a thorough evaluation of witness testimony, documentary evidence and expert reports conducted over a 25-day trial. The learned Judicial Commissioner had the distinct advantage of observing witness demeanour and assessing credibility first hand, advantages that this court does not possess when reviewing the written record.

[140] Where the trial judge's conclusions can be supported on a rational basis in view of the material evidence, the fact that an appellate court might have decided differently is irrelevant. As the Federal Court emphasised in *Ng Hoo Kui* at para. [148], "a finding of fact that would not be repugnant to common sense ought not to be disturbed".

Conclusion

[141] We are satisfied that the learned Judicial Commissioner's decision was correct in law and fact. Her analysis comprehensively addressed all the key issues raised by the parties and reached conclusions that were well-supported by the evidence and consistent with established legal principles.

[142] Directors who act honestly, with reasonable care and in good faith are entitled to protection from liability even when their business decisions ultimately prove unsuccessful.

[143] Courts must resist the temptation to apply hindsight analysis and must instead focus on the reasonableness of decision-making processes based on circumstances existing at the time.

[144] For all the reasons set out in this judgment, we dismiss this appeal with costs. The learned Judicial Commissioner's decision dismissing the appellant's claims against all respondents is affirmed in its entirety.